Supreme Court, U.S.
FILED
MAR 3 1972
E. ROBERT SEAVER, CLERK

No. 71-1121

SUPREME COURT OF THE

UNITED STATES OF AMERICA

RICHARD A. PETREE, SR.

VS.

THE STATE OF GEORGIA

PETITION FOR THE WRIT OF CERTIORARI

TO

THE COURT OF APPEALS OF GEORGIA

OCTOBER TERM, 1971

THOMAS H. ANTONION
AND
ROBERT R. TISDALE
ATTORNEYS FOR
PETITIONER

1421 Candler Building
127 Peachtree St., N.E.
Atlanta, Georgia 30303
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IN THE SUPREME COURT

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No. _____

IN THE SUPREME COURT OF THE

UNITED STATES

_____ Term

RICHARD A. PETREE, SR.,

Petitioner

VS.

THE STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

TO

THE COURT OF APPEALS OF GEORGIA

RICHARD A. PETREE, SR., prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals of the State of Georgia rendered and entered September 27, 1971, and reported as 124 Ga. App. 670. The opinion and Judgment of said Court of Appeals of the State of Georgia is appended hereto (App. B. Infra. P. 53) of said

Appendix. The dissenting opinion in said case is appended hereto also (App. C. Infra. P. 72).

JURISDICTION

This Court has jurisdiction of this case as shown by Rule 19(a) of this Court and because the State Court of Appeals has decided a Federal Question of substance in a way not in accord with the applicable decisions of this Court and the State Court of Appeals has decided a Federal question of substance in a way in conflict with this Court.

The decision was entered in the Court of Appeals of Georgia on September 27, 1971. Certiorari to the Supreme Court of Georgia was denied December 1, 1971, and Motion for rehearing denied and entered December 20, 1971.

QUESTIONS PRESENTED

(1) Can a defendant be denied the benefit of the Fifth and Fourteenth Amendments to the United States Constitution by operation of State

law and procedure?

(2) Should the State Court not correct its own Constitutional error when discovered, the State rules of procedure notwithstanding?

(3) Does an obvious violation by the State of Federal Constitutional rights of a defendant have to be called to the State's attention by the defendant?

(4) Does Collateral estoppel apply on the trial of a two-count indictment where both counts are the same transaction?

(5) Does Double Jeopardy attach at the instant of a "not guilty" finding by a jury on Count One of a Two Count Indictment, when the defendant has been charged in the Two Count Indictment with both charges alleging BRIBERY, so as to bar a separate finding of "guilty" on the Second Count.

(6) Can a defendant be forced to trial over

objection on a Two Count Indictment, each charge of which alleges the same crime -BRIBERY- consisting of the same elements, people, transaction, and time and place without violating the defendant's right to be free from Double Jeopardy as provided by the Fifth Amendment to the United States Constitution, as extended by the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

FIFTH AMENDMENT TO UNITED STATES CONSTITUTION

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of

life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis Supplied)

ARTICLE 1, SECTION 1, PARAGRAPH VIII

BILL OF RIGHTS

OF

THE GEORGIA CONSTITUTION OF 1945

Ga. Code Ann. § 2-108. (6364) Paragraph, VIII, Jeopardy of life or liberty more than once forbidden. "No person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his, or her own motion for a new trial after conviction, or in case of mistrial."

THE FOURTEENTH AMENDMENT TO

UNITED STATES CONSTITUTION

"All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

GEORGIA LAWS OF 1968 Pg. 1249-1267

Ga. Code Ann. § 26-506. Multiple prosecutions for same conduct---

"(a) When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if (1) one crime is included in the other, or (2) the crimes differ only in that one is defined to prohibit a designated kind of con-

duct generally and the other to prohibit a specific instance of such conduct.

"(b) If the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution except as provided in subsection (c). (Emphasis Supplied)

"(c) When two or more crimes are charged as required by subsection (b), the court in the interest of justice may order that one or more of such charges be tried separately."

GEORGIA LAWS OF 1968, Pg. 1249-1305

Ga. Code Ann. § 26-2301. BRIBERY.--

"A person commits bribery when:

"(1) He gives or offers to give to any person acting for or on behalf of the State or any political subdivision thereof or of any agency of either,

any benefit, reward, or consideration to which he is not entitled with the purpose of influencing him in the performance of any act related to the functions of his office or employment; or

"(2) Acting for or on behalf of the State or any political subdivision thereof or of any agency of either, he solicits or receives any such benefit, reward, or consideration."

"A person convicted of bribery shall be punished by a fine of not more than $5,000, or by imprisonment for not less than one nor more than 20 years, or both."

GEORGIA LAWS OF 1968, Pg. 1249-1305

Ga. Code Ann. § 26-2304. (b) Improperly influencing legislative action. --

"(b) Local Government Officer or Employee. -

"Any officer or employee of a political subdivision who asks for or receives anything of

value to which he is not entitled in return for an agreement to procure or attempt to procure the passage or defeat the passage of any legislation by the legislative body of the political subdivision of which he is an officer or employee shall, upon conviction, be punished by imprisonment for not less than one nor more than five years."

STATEMENT OF THE CASE

RICHARD A. PETREE, SR., and B. HUGH ANSLEY were indicted and charged with two counts of bribery. Defendants filed their demurrer and the Court over-ruled them. The case proceeded to trial before a jury. At the end of the State's evidence and also at the close of all evidence the defendant moved that the State be compelled to elect upon which Count it would proceed. The Trial Court over-ruled both the motion and the renewal thereof. Defendant appealed to the

Court of Appeals of Georgia and brought the issue forward with his enumeration of error. The Court of Appeals of Georgia sustained the Trial Court, and denied re-hearing.

Defendant then applied for Certiorari in the Supreme Court of Georgia, but it was denied on December 1, 1971, and his motion for rehearing was denied on December 20, 1971. The Federal issues thoughwith different names, were raised by Defendant's demurrer and oral motions and these Federal issues were brought forward through both State Appellate Courts. These issues are now presented to this Court.

REASONS FOR ALLOWING THE WRIT

(1) To prevent further violation of the right to be free from Double Jeopardy by virtually every Court of Record in the United States everyday by their use of the Two Count Indictment charging the same transaction and the same crime.

(2) To ascertain and clearly state when the State Court must on its own motion recognize and rule on an obvious violation of a Federal Constitutional right, the State rules of procedure notwithstanding.

(3) To determine whether a defendant may be denied Federal Constitutional benefits by operation of State law.

(4) To ascertain and clearly state when and under what circumstances Double Jeopardy attaches in a Two Count Indictment after acquital on the first count involving the same transaction as the ~~First~~ 2nd. Count.

(5) To ascertain and clearly state when and under what circumstances Double Jeopardy attaches in a Two Count Indictment before trial, where timely and proper objection has been made, where the same crime is charged in both Counts.

ARGUMENT

The Court of Appeals of Georgia in deciding the case at bar said:

"The only offense expressly designated as bribery under Georgia Law is Code Ann. § 26-2301, covering one who "Solicits" something for "the purpose of influencing" official action. In this sense it is obvious that the offense under § 26-2304(b) covering one who "asks for" something "in return for an agreement to procure or attempt to procure" legislative action is also a species of bribery, regardless of the label used by the General Assembly." (Ansley & Petree VS. the State 124 Ga. App. 670 bottom of 672 and top of 673) Emphasis Supplied.

Petitioner submits that the Court of Appeals of Georgia, in its own decision recognized and saw the theory of collateral estoppel and the same transaction rule, and we quote them,

"We recognize further that the trial judge, having refused to require the State to elect upon

which count it would proceed, acted favorable to the defendants in requiring the jury in the event of a finding of guilt on one count, to acquit on the other. Even if two separate offenses were alleged, for reasons already stated, the action of the trial judge is consonant with the guidelines stated in Code Ann. § 26-506 (a) which protect an accused from a conviction "of more than one crime if (1) one crime is included in the other, or (2) the crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct."

Ansley & Petree VS. The State 124 Ga. App. 670 (bottom of 676). But the Court of Appeals of Georgia failed to reverse.

Also in this respect see the 7th division of Ansley & Petree, Supra, reading as follows:

"7. Finally, we reach the contention that the verdicts of not guilty of Count 1 and guilty of

Count 2 are repugnant and inconsistent. Obviously the indictment purports to allege aspects of the same conduct to state two offenses based on the same transaction, the first under Code Ann. § 26-2301 (2) and the second under Code Ann. § 26-2304 (b)." (Ibid 675)

The majority misapplied the facts to the law in this respect. Please see the dissenting opinion, especially the first eight pages thereof.

The Hon. Randall Evans, the dissenting justice, saw the problem in the light of State law and not in the light of Double Jeopardy, but Former Jeopardy involving the same transaction and collateral estoppel is scattered throughout the first thirty-three (33) pages of his brilliant dissent.

The danger of Double Jeopardy has been reduced by the theory advanced in Waller VS. Florida (397 US. 387) that a city trial and a subsequent State trial or Indictment amounts to

Former Jeopardy, if the same transaction is involved.

Ashe VS. Swenson (397 US. 436) carries the protection against Double Jeopardy further to protecting an accused from a subsequent prosecution by the same Court on a different Count in an Indictment after a previous trial on a first Count Indictment charging the same crime in different language, but relying on the same transaction for conviction, using the same evidence to establish the same transaction.

Petitioner contends that virtually every Court of record in the United States violates the Fifth Amendment to the United States Constitution every day be use of the Two Count Indictment alleging two crimes but relying on the same transaction and the same evidence to convict on both crimes, as in the case at bar.

Is it true: the trial judge "...acted

favorably to the defendant(s) in requiring the jury in the event of a finding of guilt on One count, to acquit on the other...?" No! Double Jeopardy was committed at the outset of the trial with the overruling of the demurrers (R19). Then defendant was subjected to Double Jeopardy with the denial of the Motion to compel the State to elect (T687 & T688). Double Jeopardy was put on the defendant again when the renewed Motion to elect was made and denied. (T1260 & T1262); and again when the jury acquitted on Count One, convicted on Count Two; and finally when the judge passed sentence on the finding of guilty on Count Two.

The trial judge's actions here cannot serve as a substitute for the Bill of Rights which includes the Fifth Amendment.

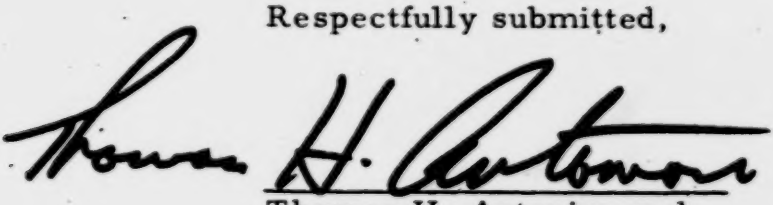
Petitioner contends that a logical extension of the reasoning in the Waller and Ashe cases (Supra) is shown by the case at bar; and to hold

otherwise would undo a steady process of defining Double Jeopardy, Collateral Estoppel and would impair the application of the Same Transaction Rule as has been brought forward over the years since 1796.

CONCLUSION

For the reasons stated above and the matters in the appendix, the petition for Certiorari should be granted.

Respectfully submitted,



Thomas H. Antonion and
Robert R. Tisdale
Attorneys for Appellant

1421 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303
523-2574

CERTIFICATE

I, THOMAS H. ANTONION, do certify that I have served every one and every party that needs to be served with a copy of this application for Certiorari. I have served the Hon. Lewis R. Slayton, District Attorney, and B. Hugh Ansley, Co-defendant, by placing 3 copies of this application for Certiorari in a properly addressed envelope, addressed to Hon. Lewis R. Slayton, District Attorney, Fulton County Courthouse, Atlanta, Georgia, 30303, and Mr. B. Hugh Ansley, 3533 Bowling Green Way, Doraville, Georgia, and by putting sufficient postage thereon to insure their first-class delivery to all parties separately, and I have personally deposited the same in the United States Mail, Certified.

This 2nd day of March, 1972.

Thomas H. Antonion

Thomas H. Antonion

APPENDIX A

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STATE OF GEORGIA, COUNTY OF FULTON.

IN THE SUPERIOR COURT OF SAID COUNTY.

THE GRAND JURORS selected, chosen and sworn for the County of Fulton, to-wit:

1. STEVE H. BOMAR, FOREMAN
2. R. L. de GOLIAN, ASSISTANT FOREMAN
3. MRS. JOSEPHINE F. THOMPSON, SECRETARY
4. MRS. LENORA F. HARTFORD, ASST. SEC.
5. MRS. C. H. BACOTE
6. MRS. JACQUELYN S. DeLAND
7. MRS. J. HARRIS DEW
8. JOHN R. GLEN
9. FRED GREER
10. WALTER D. GREER
11. J. N. HADDOCK, JR.
12. HOWARD M. HARGIS, SR.
13. HUBERT HARPER, SR.

14. BURNETT N. HULL

15. GEORGE W. KENNEDY

16.

17. TOM LOWE, JR.

18. TRUETT K. PUTNAM

19. SAM N. ROBERTS

20. COBURN THOMAS

21. JIM H. THOMAS

22. MRS. MARY THOMAS WELLS

23. DONALD N. WEST

In the name and behalf of the citizens of Georgia, charge and accuse RICHARD A. PETREE, SR. and BENJAMIN HUGH ANSLEY with the offense of: - BRIBERY (Section 26-2301) for that said accused, in the County of Fulton and State of Georgia, on the 5th day of March, 1970, the said Richard A. Petree, Sr., being then and there an

Alderman, a member of the Aldermanic Board of the City of Atlanta, a political subdivision of the State of Georgia, did unlawfully solicit from one James F. Crist, Jr., The Beck Company, and The Southeast Property Consultants, Inc., thirty thousand dollars in money of the value of $30,000.00 as a benefit, reward, and consideration to which he was not entitled, with the purpose of influencing him, the said Petree, in the performance of an act related to the functions of his, the said Petree's, office, to wit: To use his influence and obtain his vote to secure the passage of a zoning petition then pending before the said Board of Aldermen of The City of Atlanta to amend the 1954 Zoning Ordinance of The City of Atlanta and the maps established in connection therewith be changed so that the following property located Northwest corner of Interstate Highway 75 and Northside Drive be changed from "R-4" (Residential) District to "O-I-C" (Office

Institutional Conditional) District, and more particularly described as follows: Book 106 Page 334 "BEGINNING All that tract or parcel of land lying and being in Land Lot 152 of the 17th District of Fulton County, Georgia. Being more specifically described by beginning at a point on the west side of Northside Dr. R/W line; thence running in a southerly direction along the West side of Northside Dr. a distance of 583.6 feet to the Northwest corner of Northside Dr. and I-75; thence running Northwesterly along the northern R/W line and following the curvature thereof of I-75 a distance of 1,243.05 feet to a point on the North line of Land Lot 152; thence running in an easterly direction along said Land Lot line a distance of 1,003 feet to a point on the West side of Northside Dr. Said point is point of beginning. Tract herein described is vacant unimproved property consisting of approximately 9 acres."

And the said Benjamin Hugh Ansley, did intentionally aid and abet the said Petree in the commission of said crime; - contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT TWO

And the Grand Jurors aforesaid, on their oaths aforesaid, in the name and behalf of the Citizens of Georgia, further charge and accuse RICHARD A. PETREE, SR. and BENJAMIN HUGH ANSLEY with the offense of: BRIBERY (Section 26-2304 (b) for that said accused, in the County of Fulton, State of Georgia, on the 5th day of March, 1970, the said Richard A. Petree, Sr., being then and there an Alderman, a member of the Aldermanic Board of The City of Atlanta, a political subdivision of the State of Georgia, did unlawfully ask James F. Crist, Jr., The Beck Company, and The Southeast Property Consultants, Inc., for the sum of thirty thousand dollars in money of the

value of $30,000.00, to which he was not entitled in return for an agreement to attempt to procure the passage of legislation before the Board of Aldermen of The City of Atlanta, the Legislative body of said political sub-division, to wit: A zoning petition then pending before the said Board of Aldermen to amend the 1954 Zoning Ordinance of The City of Atlanta and the maps established in connection therewith be changed so that the following property located Northwest corner of Interstate Highway 75 and Northside Drive be changed from "R-4" (Residential) District to "O-I-C" (Office, Institutional, Conditional) District, and more particularly described as follows:

"BEGINNING ALL that tract or parcel of land lying and being in Land Lot 152 of the 17th District of Fulton County, Georgia. Being more specifically described by beginning at a point on the

west side of Northside Dr., where the northline of Land Lot 152 intersects said Northside Dr. R/W line; thence running in a Southerly direction along the West Side of Northside Dr., a distance of 583.6 feet to the Northwest corner of Northside Dr. and I-75; thence running Northwesterly along the northern R/W line and following the curvature thereof of I-75 a distance of 1,243.05 feet to a point on the North line of Land Lot 152; thence running in an easterly direction along said Land Lot line a distance of 1,003 feet to a point on the West side of Northside Dr. Said point is point of beginning. Tract herein described is vacant unimproved property consisting of approximately 9 acres."

And the said Benjamin Hugh Ansley, did intentionally aid and abet the said Petree in the commission of said crime; - contrary to the laws of said State, the good order, peace and dignity

thereof.

LEWIS R. SLATON, District Attorney

Special Presentment

Book 106 Page 336

Clerk's No. A-01813

Fulton Superior Court

THE STATE

vs

RICHARD A PETREE, SR.

BENJAMIN HUGH ANSLEY

BRIBERY (Section 26-2301) &
BRIBERY (Section 26-2304 (b)

True Bill

10 day of April, 1970

Steve H. Bomar, Foreman

Richard A. Petree, Sr.

waives copy of indictment,

formal arraignment, and pleads

Not Guilty.

Lewis R. Slaton by J M E Dist. Atty.

Arnold Shulman Deft's. Atty.

R. A. Petree Deft.

Benjamin Hugh Ansley

waives copy of indictments,

formal arrangement and pleads.

Not Guilty.

Lewis R. Slaton by J M E
Solicitor General

Bobby Lee Cook
Defendant's Attorney

(Illegible)

w-ar CIV CT

WITNESSES:

James F. Crist, Jr.

1718 Ptree St NW

(872-2295)

Jack L. Boyle

District Atty's Ofc

J J Little, Clerk

Atlanta City Hall

Jim Bowen

American Oil Co

6 Executive Park Dr NE

(634-6611)

Filed in Office

Apr 10, 1970

Edwin T. Durham

Deputy Clerk Superior Court

Fulton County, Georgia

STATE OF GEORGIA

VS.

RICHARD A. PETREE, SR.,

and

BENJAMIN HUGH ANSLEY

INDICTMENT NO'S.

A-1592

A-1813

FULTON SUPERIOR COURT

SPECIAL DEMURRER

Now come defendants RICHARD A. PETREE, SR. and BENJAMIN HUGH ANSLEY, prior to arraignment, and file this their Special Demurrer to Indictment numbers A-1813, said special demurrer being herein filed and made both jointly and severally, and for grounds thereof show the following:

1.

The word "Bribery" as used in Count Two of said indictment is inconsistent with the crime of Improperly Influencing Legislative Action which is alleged in said Count Two of said indictment.

The use of the word "Bribery" in Count Two of said Indictment is surplusage in that said Count Two does not allege the commission of the crime of Bribery, but, rather, said Count Two alleges the commission of the Crime of Improperly Influencing Legislative Action.

WHEREFORE, these defendants pray that this their special demurrer be inquired into and sustained and that the word "Bribery" used in Count Two of said Indictment be stricken.

/s/ B. Hugh Ansley
B. HUGH ANSLEY

/s/ James R. Venable
JAMES R. VENABLE

ACKNOWLEDGEMENT OF SERVICE

Due and legal service of the within and foregoing Special Demurrer acknowledged. Copy received. This 22 day of May, 1970.

/s/ J. Melvin England

Book 114 Page 72

STATE OF GEORGIA : FULTON SUPERIOR

VS. : COURT

RICHARD A. PETREE, SR. : INDICTMENT NO'S.

and : A-1592 and A-1813

BENJAMIN HUGH ANSLEY :

ORDER

Motions to Suppress certain evidence having been filed by both defendants and a special demurrer and Motion to Quash the Indictment having been filed by the defendant Benjamin Hugh Ansley; and the Court having heard evidence and argument by counsel for the defendants and the State;

Each of the foregoing Motions to Suppress, the Special Demurrer and the Motion to Quash are hereby overruled on each and every ground.

SO ORDERED, this 1st day of July, 1970.

/s/ Elmo Holt
ELMO HOLT, JUDGE
FULTON SUPERIOR COURT,
A. J. C.

Book 120 Page 87

VERDICT

AS TO COUNT ONE:

We the Jury find the defendants Benjamin Hugh Ansley and Richard A. Petree, Jr. not guilty.

James H. Walker

Foreman Aug 4, 1970

AS TO COUNT TWO:

We the Jury, find the defendants Benjamin Hugh Ansley and Richard A. Petree, Sr. guilty as charged.

James H. Walker

Foreman Aug 4, 1970

Book 106 Page 333

We the Jury fix the sentence of One year in the

Penitentiary for the defendant Benjamin Hugh Ansley.

James H. Walker, Foreman,

Aug 4, 1970

We the Jury recommend the charge against Benjamin Hugh Ansley be considered a misdemeanor.

James H. Walker, Foreman,

Aug. 4, 1970

We the Jury fix the sentence of <u>One</u> year in the Penitentiary for the defendant, Richard A. Petree, Sr.

James H. Walker, Foreman

Aug 4, 1970

We the Jury recommend the charge against Richard A. Petree, Sr. be considered a misdemeanor.

James H. Walker, Foreman

Aug 4, 1970

SENTENCE:

Charge Bribery(Section 26-2301) & Bribery

(Section 26-2304 (b)

FULTON SUPERIOR COURT

No. A 01813 July Term, 1970

THE STATE (Verdict) of Guilty As

vs. to Count # 2

Richard A. Petree, Sr.

WHEREUPON, It is ordered and adjudged by the Court that the Defendant, Richard A. Petree, Sr. be taken from the Bar of this Court to the Jail of Fulton County, and be there safely kept until a sufficient guard is sent for him from the Georgia Penitentiary, and be then delivered to, and be by said guard taken to said Penitentiary, or to such other place as the Director of Corrections may direct, where he, the said defendant be confined at labor for the full term of One (1) years to be computed according to law.

By the Court Aug 4, 1970

LEWIS R. SLATON
District Attorney

/s/ Elmo Holt
Judge S. C. A. J. C.,
Presiding.

FILED IN THIS OFFICE, MINUTES 20

THIS THE 4th August 1970 PAGE 239

/s/ Charles E. Suber
Deputy Clerk, S. C., A. J. C.

COURT REPORTER: Stewart

MOTION FOR NEW TRIAL

STATE OF GEORGIA NO. A 01813

vs.

RICHARD A PETREE, SR. FULTON SUPERIOR

BENJAMIN HUGH ANSLEY COURT

Verdict and Judgment for Guilty of Bribery at July term, 1970, of Fulton Superior Court, on 4th day of August, 1970.

The Defendant, Richard A. Petree, Sr. being dissatisfied with the verdict and judgment

in said case, comes during said term of court, before the adjournment thereof, and within 30 days from said trial, and moves the court for a new trial, upon the following grounds, to-wit:

1st. Because the verdict is contrary to evidence and without evidence to support it.

2nd. Because the verdict is decidedly and strongly against the weight of the evidence.

3rd. Because the verdict is contrary to law and the principles of justice and equity.

Whereupon Defendant Richard A. Petree, Sr. prays that these, his grounds for a new trial, be inquired of by the court, and that a new trial be granted.

/s/ Arnold Shulman

Attorney..for Movant...

Order to Show Cause and Supersedeas.

The foregoing motion read and considered.

Let the motion be filed, served upon Counsel for State of Georgia, and let the State of Georgia show cause before me on the 20 day of Nov., 1970 at 10:00 AM, why the motion should not be granted. Let this order act as a supersedeas until further order of Court. In the meantime and until the final hearing of said Motion, whenever the same may be had, Movant is allowed to amend and perfect the motion, and to prepare, present for approval, and file the brief of evidence in said case.

This 4th day of August, 1970.

/s/ Elmo Holt
Judge Superior Court

Atlanta Judicial Circuit

$10,000.00 Bond Book 125 Page 472

AMENDMENT TO MOTION FOR NEW TRIAL

GROUND FOUR

Because the Court erred in overruling the Motion of the Movant to require the State to elect at the conclusion of the evidence as to which of the two counts under which the indictment was drawn, if either, it desired to proceed upon.

The first count of said indictment charging a crime under Georgia Code Section 26-2301, and the second count charging the Movant with a crime under Georgia Code Section 26-2304 (b).

It is the contention of the Movant that the elements of such alleged crimes are one and the same, and that the Court should have required the State, after the closing of the evidence, to elect under which count they were proceeding, and under which count they would go to the jury. And that the Court erred in permitting both counts to be considered by the jury.

This Motion was renewed and reurged (See

Page 1260 of the transcript) on behalf of the Defendants to require the State to elect as to which count it would proceed upon. This renewed Motion was made at the conclusion of the evidence in the case.

"If Your Honor please, before the jury has returned, I have a Motion that I would like to make for the purpose of the record, if I may. If it pleases the Court, on behalf of the Defendant, Ansley, as well as Petree, I now renew and reurge my Motion to require the State elect as to which count it will now proceed upon. It is our theory of the case that count number one and count number two are identical insofar as it relates to the conduct which is proscribed or prohibited by 26-2301 and count one and 26-2304 sub-section (b) in count two. The prohibited or proscribed conduct in each of the Code Sections is identical. Each section seeks to prohibit the

same type of action. Therefore, if a jury found a defendant not guilty on count one and then guilty on count two, the verdict would be a legal obscurity, and it would be repugnant inasmuch as count number one embraces the same prohibited conduct as count number two. In fact, if a jury found the defendant not guilty on count one and then guilty on count number two, he would be able to say that his double jeopardy right, as made and set forth in the case of Ash vs. Swinson and Walter vs. Florida as reported in 89 Supreme Court Report, Page 1184, and 90 Supreme Court 1189 would have been violated wherein the Court applies the doctrine of collateral estoppel and says that it has constitutional dimensions under the Fifth Amendment and particularly under the double jeopardy clause. We also call the Court's attention with reference to this Motion to the case of Kuck vs. State, 149 Georgia Supreme

Court at Page 192, which principle is enunciated that no form of verdict will be good which creates a repugnancy or absurdity in a conviction."

The Court overruled such Motion, and the overruling thereof was and is erroneous.

GROUND FIVE

Because the verdict of the jury in finding the Movant not guilty on the first count of the indictment and guilty on the second count of the indictment is inconsistent, repugnant and a legal absurdity. In view of the fact that the material elements of the two counts are one and the same, it is clear that the verdict of the jury is illegal, void, invalid, inconsistent, repugnant and a legal absurdity.

WHEREFORE, Movant, RICHARD A. PETREE, SR., prays that these, his additional grounds of Motion for a New Trial, be inquired of by the Court, approved and allowed, and that

a new trial be granted him.

/s/ Arnold Shulman
ARNOLD SHULMAN
Attorney for Movant,
Richard A. Petree, Sr.

ORAL MOTION

we now very briefly and very quickly make an additional motion to the effect that we insist and contend that under the way and manner in which this indictment is drawn, inasmuch as it contains two counts, one count of bribery, count number one, and in count number two improperly influencing legislative officers. We now move the Court to require the State to elect at the conclusion of this evidence as to which count, if either, it desires to proceed upon. (Emphasis supplied)

Page 687, T.

THE COURT; Well, I think in one of the conferences that we had I have indicated some concern to you gentlemen about this. I have

indicated previously and will say now that I expect to charge the jury along that line, that they may not convict on both counts. But if they convict at all it would be on one or two.

All right, that motion then is overruled and denied. (Emphasis Supplied) Page 688, T.

(Whereupon a recess was had.)

(Argument of counsel.)

MR. COOK: If Your Honor please, before the jury has returned, I have a motion that I would like to make for the purpose of the record, if I may. If it pleases the Court, on behalf of the defendant Ansley as well as Petree, I now renew and re-urge my motion to require the State elect as to which count it will now proceed upon. (Emphasis Supplied). Page 1260, T.

THE COURT: All right, Mr. England, you want to respond?

MR. ENGLAND: If Your Honor please,

I think I only need to respond to the first motion about asking for an election under Georgia Code Section 26-506. We take the position that such an election is not required by the law and we decline to make such an election.

THE COURT: All right, gentlemen, I overrule both motions. Anything further outside the presence of the jury? (Emphasis Supplied) Page 1262, T.

ENUMERATION OF ERROR

35.

The trial court erred in overruling

defendant's motion to require the State to elect, at the conclusion of the State's evidence, which of the two counts under which the indictment was drawn, it desired to proceed upon (T-687, 688). (Page 10)

36.

The trial court erred in overruling defendant's renewed motion to require the State to elect, at the conclusion of the evidence in the case, which of the two counts under which the indictment was drawn, it desired to proceed upon. (T-1260-1262).

37.

The trial court erred in permitting, over objection, the jury to consider both counts under which the indictment was drawn. (T-1260-1262).

38.

The trial court erred in charging the jury that if it should find defendant not guilty as to

count one, it must then proceed to consider count number two. (T-1290).

39.

The trial court erred in entering judgment of guilty and sentence thereon as to Count Two of the Indictment after having entered judgment of not guilty as to Count One of the Indictment, said judgments being inconsistent. (R-45,46).

40.

The trial court erred in entering judgment of guilty and sentence thereon as to Count Two of the Indictment after having entered judgment of not guilty as to Count One of the Indictment, said judgments being void for repugnancy. (R-45,46).

41.

The verdict of the jury in finding defendant not guilty of Count One of the indictment and guilty of Count Two of the Indictment, the

material elements of the two counts being one and the same, is inconsistent. (R-45). (Page 11).

42.

The verdict of the jury in finding defendant not guilty of count one of the Indictment and guilty of Count Two of the Indictment, the material elements of the two counts being one and the same, is void for repugnancy. (R-46).

43.

The judgment of the court in finding defendant not guilty of Count One of the Indictment and guilty of Count Two of the Indictment, the material elements of the two counts being one and the same, is inconsistent. (R-45, 46).

44.

The judgment of the court in finding defendant not guilty of Count One of the Indictment and guilty of Count Two of the Indictment, the material elements of the two counts being

one and the same, is void for repugnancy. (R-45, 46).

45.

The trial court erred in overruling defendant's Motion for New Trial, as amended. (R-62).

This Court has jurisdiction of the subject matter of the case because it is a felony other than a capital felony and not under the Constitutional provision as to exclusive jurisdiction of the Supreme Court. (Page 12)

ARNOLD SHULMAN
Attorney for Appellant
Richard A. Petree, Sr.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 30334, 12/1/71

Dear Sir:

Cases No.s 26930, Petree V. State

26931, Ansley V. State

The Supreme Court today denied the writ of certiorari in these cases.

Very truly yours,

Mrs. Joline B. Williams

Clerk

SUPREME COURT OF GEORGIA

Atlanta, December 20, 1971

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Richard A. Petree, Sr., v. The State.

Upon consideration of the motion for a

reconsideration filed in this case, it is ordered that it be hereby denied. Felton, J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Joline B. Williams, Clerk.

APPENDIX B

46215 ANSLEY VS. THE STATE

46216 PETREE VS. THE STATE

46215. ANSLEY v. THE STATE J-50

46216. PETREE v. THE STATE J-51

1. An offense under Code § 26-2304(b) is bribery in the sense the word is used in 18 USC 2516 (2) and Code § 26-3004(c).

2. The penalty for a violation of 18 USC 2518 (8) (a) in failing to deliver recordings immediately

to a judge issuing a surveillance order is limited to the contempt power of the judge and such a violation does not render the evidence inadmissible.

3. The surveillance was not improperly conducted by reason of any deficiencies in the order, warrant, or supporting affidavit.

4. The surveillance preceding the order, a party having consented to the recordings to detect communications in furtherance of the commission of a crime, comes within the exceptions of 18 USC 2511 (2) (c & d) and Code § 26-3006.

5. Statements surreptiously obtained from individuals who were then suspects not in custody did not violate constitutional standards requiring counsel or otherwise applicable to individuals in custody or individuals in a defendant stage of the proceedings.

6. The trial judge did not abuse his discretion in

refusing to require the State to elect to proceed with the prosecution under Code § 26-2301 or Code § 26-2304(b).

7. An acquittal of bribery laid under Code § 26-2301 (2) under the circumstances here disclosed is not repugnant and inconsistent with a conviction of soliciting to influence legislative action under Code § 26-2304 (b).

Richard A. Petree, Sr., an Alderman of the City of Atlanta, and Benjamin Hugh Ansley, as his abettor, were tried together, convicted, and sentenced under Count Two of an indictment alleging a violation of Code § 26-2304(b) on March 5, 1970, in soliciting $30,000 for an agreement to procure the passage of zoning legislation by the Board of Aldermen. This same jury simultaneously acquitted the defendants under Count One of the indictment, alleging a violation of Code § 26-2301,

in soliciting $30,000 for Petree to use his influence and to obtain his vote for the passage of the same zoning legislation described in Count Two. The appeals are substantially identical.

JORDAN, Presiding Judge. 1. On the ex parte verified petition of the District Attorney of the Atlanta Judicial Circuit and a supporting affidavit of one of his assistants, a judge of the Atlanta Judicial Circuit issued an investigative warrant and order dated March 13, 1970, to permit surveillance, including the use of recording devices, within specified areas of Fulton County for a period terminating at midnight, March 21, 1970, to obtain evidence relating to the offense of improperly influencing legislative action under Code § 26-2304(b). The defendants contend that the trial judge erred in failing to sustain a motion to suppress because the offense described under Code § 26-2304(b) is not "bribery"

as the word is used in 18 USCA 2516 (2) or Code § 26-3004.

The cited federal statute, enacted as a part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968; P. L. 90-351; 82 Stat 197, 217; 18 USC 2516 (2), provides that on application by a principal prosecuting attorney "to a State court judge of competent jurisdiction" the judge, in conformity with other provisions of the law and the applicable State statute, may authorize or approve "the interception of wire or oral communications by investigative or law enforcement officers" when the interception "may provide or has provided evidence..of the offense of..bribery..or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing

such interception."

While the trial judge cited the applicable State

law as "Section 26-2005, Georgia Code Annotated" the applicable law is Code § 26-3004(c), which is substantially identical to the statute which it superseded. Both refer to "any crime under the laws of this State, or the United States involving.. bribery" See and compare Ga. L. 1967, pp. 844, 847; 1968, pp. 1249, 1328.

In statutory enactments "ordinary signification shall be applied to all words of art, or words connected with a particular trade or subject-matter, when they shall have the signification attached to them by experts in such trade, or with reference to such subject-matter." Code § 102-102 (1). In ordinary signification "bribery" may mean an "act of influencing the action of another by corrupt in-

ducement." Merriam-Webster's New International Dictionary, 2d Ed., Unabridged. A standard meaning

as a legal word of art is somewhat broader to include "offering, giving, receiving, or soliciting of anything of value to influence action as (an) official or in discharge of (a) legal or public duty." Black's Law Dictionary, 4th Ed.

The only offense expressly designated as bribery under Georgia law is Code § 26-2301, covering one who "solicits" something for "the purpose of influencing" official action. In this sense it is obvious that the offense under § 26-2304 (b) covering one who "asks for" something "in return for an agreement to procure or attempt to procure" legislative action is also a species of bribery, regardless of the label used by the general assembly.

Accordingly, we conclude that Code § 26-2304 (b) is an offense coming within the provisions of 18 USC

2516 (2) and Code § 26-3004(c).

2. In urging that electronic recordings obtained pursuant to the investigative warrant were erroneously admitted in evidence the defendants emphasize the fact that the recordings were not delivered immediately to the issuing judge. The warrant and order dated March 13, 1970, provided for "return hereof and report as required by law before me within thirty days of the date hereof."

The applicable State statute requires a return and report within a maximum of 30 days of the issuance of the warrant. Code § 26-3004(i). It appears that return was made on or about April 7, 1970, and within 30 days from the date of the order.

The applicable federal provision requires that the recordings are to be made available to the judge issuing the order immediately upon the expiration

of the period of the order and are to be sealed under his direction. 18 USC 2518 (8) (a). Evidence obtained in violation of any of the provisions of the State law is inadmissible, except to prove an unlawful surveillance or invasion of privacy. Code § 26-3007. But the penalty for a violation of the above stated requirements of the federal statute is limited to the contempt powers of the issuing judge. 18 USC 2518 (8)(c). Such a violation is not included in the allowable grounds of a motion to suppress. 18 USC 2518 (10).

The evidence was not inadmissible for any reason here argued.

3. In attacking the validity of the order

authorizing the surveillance the defendants rely on Cross v. State, 225 Ga. 760 (171 SE2d 507); Burns v. State, 119 Ga. App. 678 (168 SE2d 786);

and Fowler v. State, 121 Ga. App. 22 (172 SE2d 447). We have carefully examined these cases in the light of the order in this case and conclude that these cases afford no basis for a determination that the surveillance was improperly conducted by reason of any alleged deficiencies in the order or warrant and the supporting affidavit. A reading of the Cross case shows that it deals only with chapter 119 of 18 USCA relating to the requirement for obtaining an order authorizing wire tapping and 18 USC 2518 (4) (e) and (5) as to the requirements for the contents of such order. The facts in this case show clearly that an order was obtained as required and that the contents of such order met the require-

ments of both federal and state statute, thus taking this case out of the holding in Cross.

4. The defendants contend that telephone

messages intercepted preceding the surveillance order violated State and federal law, arguing that at the time there was no commission of a crime and that the messages were not in furtherance of a crime. It is undisputed that these recordings were made through devices placed in the office of one of the persons named in the indictment as a person from whom money had been and was being solicited, who expressly consented to the surveillance, and the

evidence amply supports a conclusion that the messages were in furtherance of the commission of a crime.

Under Georgia law a permissible exception is recognized "in those instances wherein the message shall be initiated or instigated by a person and the message shall constitute the commission of a crime or is directly in the furtherance of a crime, provided at least one party thereto shall consent." Code § 26-3006. The federal law includes similar exceptions. 18 USC 2511 (2) (c & d).

It is also contended that the evidence discloses that these recordings were "so inaudible and indistinct in many portions that would require, therefore, the jury to merely speculate as to what was said."

The above contentions are without merit.

5. It is further asserted that the constitutional rights of the defendants were "violated when they were, by electronic surveillance, exposed to inter-

rogation by law enforcement officers without being advised at that time that they would have the right to counsel, and unless counsel was present at the time of interrogation." The argument is advanced on the theory that during the period of surveillance immediately before apprehension, with an arrest warrant already issued for one of the individuals, the individuals were already in a defendant stage of the proceedings. In our opinion the record and transcript makes it clear that at this stage they were merely suspects not in custody.

The law enforcement officials were acting at the time pursuant to the surveillance order, and unless the laws authorizing the order supporting

their actions are unconstitutional, and no such issues are before this court, there was no violation of any constitutional rights as here insisted

upon.

The present case is not within the rulings of any of the landmark Supreme Court cases which the defendants cited, i.e., Nardone v. United States, 302 US 379; Gideon v. Wainwright, 372 US 335; Massiah v. United States, 377 US 201; and Miranda v. Arizona, 384 US 436.

Obviously none of these cases involve suspects not in custody, and they do not disclose any rulings which we consider applicable to suspects not in custody as disclosed in the present case.

6. The trial judge overrulled motions, at the close of the State's evidence, and at the close of all of the evidence, to require the State to elect which of the two counts it would proceed upon.

In our opinion the rulings as made involved the exercise of a sound discretion by the trial judge,

and nothing appears to disclose any abuse of this discretion. See Pippin v. State, 205 Ga. 316 (5) (53 SE2d 482); Sutton v. State, 124 Ga. 815 (53 SE 381); Lascelles v. State, 90 Ga. 347 (16 SE 945); Stewart v. State, 58 Ga. 577; Hoskins v. State, 11 Ga. 92; Webb v. State, 47 Ga. App. 505 (170 SE 827).

7. Finally, we reach the contention that the verdicts of not guilty of Count One and guilty of Count Two are repugnant and inconsistent. Obviously the indictment purports to allege aspects of the same conduct to state two offenses based on the same transaction, the first under Code § 26-2301 (2) and the second under Code § 26-2304(b).

The meaning of the offense set forth in Code §

26-2301(2) is dependent upon the language of Code § 26-2301(1) with respect to the purpose for which the person "solicits or receives" and is thus re-

stricted to "influencing him in the performance of any act related to the functions of his office or employment" (emphasis added) whereas the purpose under § 26-2304(b) is "an agreement to procure or attempt to procure the passage or defeat the passage of any legislation" which includes solicitation for the sale of influence by the perpetrating officer or employee, who might or might not be a member of the legislative body, on others, members of the legislative body, to assure the passage or defeat of legislation. Thus to the extent that it is alleged under Count One that Petree, with Ansley as his abettor, solicited the sale of his own vote as a member of the legislative body, the alleged transaction is an offense under Code § 26-2301(2), but should it appear that the

solicitation was for an agreement, expressed or

implied, to procure or attempt to procure the passage or defeat of legislation, it involves the attempted sale of his influence on other members of the legislative body, and comes under Code § 26-2304(b). In brief, we see a distinction in accusing Petree, in conjunction with Ansley, of soliciting the sale of his own vote, and in accusing him, in conjunction with another, of soliciting the sale of his influence in procuring favorable legislative action, which might or might not include his own vote. Thus, from the standpoint of conviction and acquittal, and acquittal under Count One of the indictment as alleged is not, as a matter of law, inconsistent and repugnant to a simultaneous conviction of Count Two. Accordingly, the rule in Kuck v. State, 149 Ga. 191

(99 SE 622), and similar cases is inapplicable to

the present case. See Blair v. State, 81 Ga. 629 (7 SE 855).

We recognize further that the trial judge, having refused to require the State to elect upon which count it would proceed, acted favorably to the defendants in requiring the jury in the event of a finding of guilt on one count, to acquit on the other. Even if two separate offenses were alleged, for reasons already stated, the action of the trial judge is consonant with the guidelines stated in Code § 26-506(a) which protect an accused from a conviction "of more than one crime if (1) one crime is included in the other, or (2) the crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

We find no error for any reason enumerated and

each judgment is affirmed. Bell, C. J., Hall, P. J., Eberhardt, Deen, Quillian and Whitman, JJ., concur. Pannell, J., concurs in the judgment. Evans, J., dissents.

APPENDIX C

THE DISSENTING OPINION IN THE CASE AT BAR.

46215 ANSLEY VS. THE STATE

46216 PETREE VS. THE STATE

WRITTEN BY HON. RANDALL EVANS

JUDGE, COURT OF APPEALS OF GEORGI

46215. ANSLEY v. THE STATE J-50

46216. PETREE v. THE STATE J-51

EVANS, Judge, dissenting. Richard A. Petree, Sr., an Alderman of the City of Atlanta, and Benjamin Hugh Ansley, were tried under an indictment for bribery in two counts, in each of which Petree was charged as principal and it was charged that Ansley "did intentionally aid and abet" said principal. The jury returned a verdict of not guilty as to Count One, and returned a verdict of guilty as to Count Two.

During the trial, Defendants made timely

motions to require the State to elect as to which count it would rely on, contending there could be

1.

no legal conviction on both counts, as each transaction was the same thing in each count, and that, in effect, the indictment was charging the same thing against Defendants twice. The trial judge overruled the aforesaid motions, but instead, charged the jury that Defendants could not be convicted on both counts, and if convicted on either count, to acquit on the other. The trial judge thus seems to have agreed with Defendants in their contention and motion to require an election upon the ground that the same offense was charged in each count, albeit he overruled their motions.

The Supreme Court and Court of Appeals have repeatedly held that a verdict which creates a repugnancy or absurdity is not a good verdict.

2.

Illustrative are those cases where in one count Defendant is charged with illegally possessing whiskey and in another count is charged with illegally selling whiskey. Where juries have acquitted the Defendant of possessing the whiskey and have convicted him of selling whiskey, this is a repugnancy. It is obvious that if he did not possess it, he did not sell it. Kuck v. State, 149 Ga. 191 (1) (99 SE 622) (and see discussion at pp. 192-193); Holder v. State, 88 Ga. App. 859 (78 SE2d 261); Smith v. State, 38 Ga. App. 366 (143 SE 925); Davis v. State, 43 Ga. App. 122 (157 SE 888); Britt v. State, 36 Ga. App. 668 (137 SE 791); Colley v. State, 111 Ga. App. 756 (2) (143 SE 2d 59); Finch v. State, 87 Ga. App. 426 (74 SE2d 362).

1. The first important question here is as to whether there was any difference between the

charges in Count One and Count Two of the indictment, for if not, the verdict does indeed create a repugnancy, as Defendants contend.

Count One charged that the accused unlawfully solicited from James F. Crist, Jr., The Beck Company, and The Southeast Property Consultants, Inc., $30,000.00 to influence Petree as such alderman, and

". . . to use his influence and obtain his vote to secure passage of a zoning petition then pending before the Board of Aldermen of the City of Atlanta to amend the 1954 zoning ordinance. . . ."

4.

Count Two charged that the accused did unlawfully ask James F. Crist, Jr., The Beck Company, and the Southeast Property Consultants, Inc. for $30,000.

". . . for an agreement to attempt to procure passage of legislation before the Board of Aldermen of the City of Atlanta, the legislative body of said politicial sub-division, to wit: A zoning petition then pending before said Board of Aldermen to amend the 1954 Zoning Ordinance. . . ."

The property involved was exactly the same in each count, being nine acres in Fulton County, Georgia at the northwest corner of Interstate High-

way 75 and Northside Drive; the change to be accomplished in the zoning ordinance was alleged to be the same in each count, to wit: to change said property from R-4 (residential) to O-I-D (office-institutional-conditional).

A careful study of the two counts reveals the difference between Count One and Count Two is the

difference between "tweedle-dee and tweedle-dum." In Count One it is alleged Petree was to "use his influence and obtain his vote" - while Count Two alleges Petree would "attempt to procure the passage of legislation" - and in both counts exactly the same object was to be accomplished, for the same sum of money, from the same people.

Under the posture of the case, Defendants

were precluded from filing a plea of autre fois acquit, or former jeopardy, or res judicata, as both counts were tried and submitted to the jury at the same time. If these charges had been made in separate indictments, or if the trial judge had compelled an election, after one had been tried, Defendants then would have had the right to file such plea of former jeopardy, etc. Nor were the Defendants allowed the benefit of objecting to

using the same evidence against them for the same transaction charged twice, as would have been their right if the charges had been made in separate indictments or if the trial judge had compelled an election.

Thus, instead of filing such pleas, the

Defendants could only protect themselves against the double onslaught by filing their motions to require the State to elect as to which count it would proceed upon. It is a definite advantage to the State and a disadvantage to a Defendant to have more than one count in an indictment, because juro are human and prone to compromise, by deciding for the defendant on one count and against him on another count, whereas, as Defendants contend, there actually was only one transaction and one charge against them, though it was divided into

two counts so as to appear to the jury to be two charges.

Of course, it is elementary that where an issue has been litigated between parties, all

8.

matters involved therein are settled and not subject to fresh litigation between the same parties. Walker v. State, 12 Ga. App. 91 (76 SE 762); Dickerson v. State, 91 Ga. App. 453 (85 SE2d 782); Cash v. State, 108 Ga. App. 656 (2) (134 SE2d 524). In Gray v. State, 6 Ga. App. 428 (1) it is held:

> "Where several indictments for the same offense are pending against the same person, it is immaterial upon which he is first tried. Whenever he has been acquitted or convicted upon any one of them, he can plead such acquittal or conviction in bar of another prosecution on any of the others. Irwin v. State,

117 Ga. 706 (45 SE 48)." (Emphasis added).

9.

To the same effect, see Hurst v. State, 11 Ga. App. 754 (2) (76 SE 78); and Pope v. State, 92 Ga. App. 661, 669 (89 SE2d 530).

Do both counts charge the same offense? There can be no question about it. The majority opinion clearly proceeds under a misapprehension of the language used in the two counts, and urges that Count One relates to Petree's vote, while Count Two relates to use of his influence. We quote from the majority opinion, beginning at page 13:

"Thus to the extent that it is alleged under Count One that Petree, with Ansley as his abettor, solicited the sale of his own vote as a member of the legislative body, the alleged transaction is

10.

an offense under Code 26-2301(2), but should it appear that the solicitation was for an agreement, expressed or implied, to procure or attempt to procure passage or defeat of legislation, it involves the attempted sale of his influence on other members of the legislative body, and comes under Code 26-2304(b). In brief, we see a distinction in accusing Petree, in conjunction with Ansley, of soliciting the sale of his own vote, and in accusing him, in conjunction with another, of soliciting the sale of his influence in procuring favorable legislation which might or might not include his own vote."

11.

And, although the majority opinion labors to show a difference between Counts One and Two, actually it's statement only shows a difference between

"vote" and "influence," both of which are alleged in Count One. We repeat that Count one alleges in pertinent part:

". . . To use his influence and obtain his vote. . . ."

What difference is there between a city alderman soliciting money to "use his influence and obtain his vote" for passage of legislation, as used in Count One, and in his binding himself to "an agreement to attempt to procure the passage of legislation" as used in Count Two? Could it possibly be said that Petree did not use "his influence" and "vote"

to pass the legislation, as alleged in Count One, but yet that he did "attempt to procure the passage of the legislation" as alleged in Count Two?

State's counsel approaches the question from

a different angle than does the majority opinion, and urges in its brief:

> "There is nothing inconsistent in a finding by a jury that a defendant agreed for a consideration to procure the passage of legislation by a municipal legislative body of which he was a member and at the same time that he did not simply agree to vote for the measure and use his influence on others."

This is logic in reverse. If Petree agreed for

money to procure passage of legislation, and yet did not use his vote or influence to that end, surely those who were to pay the money would have had reason to complain in the loudest tones. Could he keep the bargain - illegal though it be - by voting against the measure and using his influence against the measure and yet contend that he did,

at the same time, attempt to procure the passage of the legislation? To even suggest that Petree did not do what is alleged in Count One, and at the same time he did do what is alleged in Count Two, is absurd on its face. Could he have said, "I did not use my influence for the passage of this measure, and I did not vote for it, BUT I DID ATTEMPT TO PROCURE THE PASSAGE OF THIS LEGISLATION!"

14.

Pray tell, what could he do to attempt procurement of passage without using his vote and influence in behalf of passage? But this is what the verdict of the jury declares when it says "not guilty" on Count One, and "guilty" on Count Two.

The verdict of "not guilty" under Count One definitely established that the Defendants were not guilty of soliciting money from the named parties, to influence the actions of Petree, as a city alder-

man "to use his influence and obtain his vote to secure passage of a zoning petition."

The same jury, in the same verdict, and in the same court, in a proceeding between the State and the same defendants as to the same transaction, returned a verdict of "guilty" under Count

15.

Two, which was diametrically opposed to the finding in Count One, saying thereby that these Defendants did solicit the same sum of money from the same named parties to influence the actions of Petree, as a City Alderman "for an agreement to attempt to procure the passage of legislation, etc." (being the same legislation). Can there be any question as to repugnancy?

The jury, in effect, is saying: "Mr. Petree, you did not agree to use your influence and to vote for this legislation - but you did agree to attempt to

procure passage of this legislation." And under the State's contention, even if the evidence had clearly shown without question that Petree advised the person who offered

the bribe that he was going to vote against the legislation, and was going to use his influence against the legislation, there would be no inconsistency in the finding by the jury verdict that he did agree "to attempt to procure passage of the legislation" as to said zoning matter.

State's counsel relies heavily on Mobley v. State, 101 Ga. App. 317, 325 (4) (113 SE2d 654), and quotes extensively therefrom, urging that same "seems to settle these matters." Not so. That case dealt with a three count indictment, charging (1) forging a check, (2) uttering a check, and (3) possession of check with intent to fraudulently

pass same. Defendant was convicted on all three counts. Judge Townsend's opinion deals solely with the

question of excessive sentences and proper sentences in cases of this kind. No mention is made of what effect a verdict of not guilty on one of the counts might have had on the other counts. But it is important to note that immediately preceding the portion quoted in State counsel's brief, Judge Townsend refers (see top of p. 327) to the case of Davis v. State, 100 Ga. App. 308, 313 (in SE2d 116), also written by Judge Townsend, where Defendant moved that the State be required to elect as to which Count it would proceed upon, where the offense grows out of one transaction, and at p. 313 holds:

"The motion to elect in this case raised the question of duplicity in that it was predicated

on the fact that both indict-

ments referred to the same offense. It was accordingly a proper motion, and the failure to grant it has resulted in the defendant being under two sentences of punishment for the same offense. Accordingly, the special grounds of each of the motions for new trial raising this question was improperly overruled."

But the majority opinion says the trial court ruled favorably to Defendants by instructing the jury that Defendants could not be convicted on both counts. The ruling was definitely unfavorable to the Defendants in allowing them to be tried on two counts. It was unfavorable to allow the jury to make one decision in favor of Defendants and one decision against

them - as a compromise perhaps - when the trial court should have made that decision of ONLY ONE COUNT and not left it for the jury to use as a compromise on a verdict, finding the Defendants guilty of one-half of the Counts with which they were charged.

The majority opinion suggests that prosecutions for multiple offenses are permitted under Code § 26-506 which reads as follows:

> "(a) When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if (1) one crime is included in the other, or (2) the crimes differ

only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

"(b) If the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution except as provided in subsection (c).

"(c) When two or more crimes are charged as required by subsection (b), the court in the interest of justice may order that one or more of such charges be tried separately."

But, there is absolutely nothing in this statute which deals with, or in any manner

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alleviates, the effect of repugnant verdicts. This

statute does not suggest that a verdict of not guilty may be rendered as to one offense and a verdict of guilty rendered as to another offense growing out of the same transaction. Instead, it simply states that the Defendant may not be convicted of more than one crime where one crime is included in the other. This is a far cry indeed from a provision which would allow a not guilty verdict as to one offense and a guilty verdict of the other offense where exactly the same facts are proved to support the conviction of each offense.

Further, there is no suggestion by the

above statute that the above accused can be tried for each crime twice and that is exactly what was done in the case sub judice. The language of the indictment and the proof is sufficient in Count One to convict the Defendants of violating both Code §

26-2301 and Code § 26-2304 (b); and the language of Count Two and the proof were likewise sufficient to convice the Defendants of violating both the above statutes.

Code § 26-2301 defines bribery as solicitation by or offering to any official of a political sub-division of this State any reward to

20C.

which he is not entitled to influence him in performance of any act related to the functions of his office, whereas Code § 26-2304(b) is more limited, and makes it unlawful for solicition by or offering to any officer of a political sub-division a reward in return for an agreement to procure or attempt to procure passage of legislation by that body of which he is a member.

I repeat, the only difference is that Code § 26-2301 is as to "any act related to functions of

his office" - whereas Code § 26-2304(b) is limited to procuring or attempting to procure legislation of that body of which he is a member.

But the fallacy in the State's contention is that both counts in the indictment in the case

sub judice charge the same acts, and both counts could have been brought under Code § 26-2301; and likewise both counts could have been brought under Code § 26-2304(b).

In order for the State's position to be sound, it would have to show that one of the counts could be prosecuted only under one of the above Code Sections; while the other count could only be prosecuted under the other of the said above Code Sections. Inasmuch as each of them could definitely have been prosecuted under each of said statutes, the State had no right to try the Defen-

dants under two counts which charged the same transaction; and their motion to require the State to elect should

have been sustained. Further, the State did not allege "any act related to the functions of his office" under Code § 26-2301, and a specific act of "influencing legislation" under Code § 26-2304(b); but in both counts it alleged specifically that the alleged bribery was for the purpose of "influencing legislation" - thus specifically using language to bring each count under Code § 26-2304(b). There could be no valid contention that "Multiple prosecutions" are involved as provided for in Code § 26-506, because the same conduct is not shown to establish commission of more than one crime; nor is one alleged crime included in the other; nor does one count charge general conduct while the other

charges a specific

23.

instance of such general conduct. We repeat that the indictment here alleges specifically the crime of bribery as to "influencing legislation," which is appropriate specifically to Code § 26-2304(b); and Code § 26-506 is simply not involved in this case.

23a.

But the State's position would not be improved if it could be demonstrated that one count was applicable to one of these statutes, and the other count was applicable only to the other statute. This is because a defendant who is indicted twice for the same transaction, although under different statutes, and who is tried and acquitted under the first charge, is entitled to prevent the use of the

same evidence against him in the trial of the second charge. In the case of Harris v. State, 193 Ga. 109 (2-b) (17 SE2d 573), it was held that the Defendant who was tried and acquitted for murder, and was thereafter indicted for armed robbery in the same transaction, was entitled to have the

23b

testimony excluded on the theory of res judicata and estoppel and "the State could not use such testimony to again litigate the controlling issue already determined," and the judgment was reversed. In Holt v. State, 38 Ga. 187 Defendant was indicted for murder and demanded trial and was discharged on failure of the State to accord him a timely trial; thereafter he was re-indicted for aggravated riot, growing out of the same transaction as the murder charge. A reversal was ordered because he could not be indicted a second time for the same criminal

acts, though under a different named offense. In Banks v. State, 150 Ga. 73 (102 SE 519) Defendant secured an acquittal of the charge of seduction and at the same time of court the grand jury indicted

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him for fornication. He filed a plea in bar, alleging that the same transaction was involved. It was held that the trial court erred in striking his plea and "the offense of seduction necessarily embodies, as an element thereof, the offense of fornication. Seduction cannot be accomplished without sexual intercourse . . . if the accused, on the trial for fornication should sustain his plea, he would be entitled to an acquittal." In the case of Bell v. State, 103 Ga. 397 (2) (30 SE 294), it is held, "Where a person has been put in legal jeopardy of a conviction of an offense which is a necessary element and constitutes an essential part of

another offense, such jeopardy is a bar to a subsequent prosecution for the latter offense, if

founded on the same act." Here, the first offense was assualt and battery, and the last one was assault with intent to commit rape. In Jones v. State, 55 Ga. 625 (3) it was held that a Defendant who was put in jeopardy under charge of simple larceny could not be tried again for the same offense under the name of burglary. In Copenhaven v. State, 15 Ga. 264 (1) it was held that, "A conviction upon an indictment for burglary, is a good plea, in bar, on a trial for robbery, if the circumstances of the robbery were put in proof, in order to make out the case for which the prisoner was tried and convicted on the first indictment; because in such case the robbery constituted a part of the same transaction for which the prisoner

was first

tried . . . ." In Gully v. State, 116 Ga. 527 at 529 (42 SE 790), the Supreme Court of Georgia holds:

> "There is also another rule, which declares that if the prosecution under the second indictment involves the same transaction which was referred to in the former indictment, and it was or might have properly been the subject of investigation under that indictment, an acquittal or conviction under the former indictment would be a bar to a prosecution under the last indictment. This rule is sometimes called 'the same-transaction test.' The latter rule

has been the one adopted and generally followed in this State. In Roberts v. State, 14 Ga. 8, Judge Starnes, after stating that there seemed to be some difficulty about applying in all cases the rule known as the same-evidence test, says: 'To avoid any confusion on this subject, we adopt the rule as it is otherwise more generally, and perhaps more accurately, expressed, viz.: that the plea of autre fois acquit or convict is sufficient whenever the proof shows the second case to be the same transaction with the first.' The rule thus laid down was applied in the following cases. Holt

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v. State, 38 Ga. 187; Jones v. State, 55 Ga. 625; Buhler v. State, 64 Ga. 504; Goode v. State, 70 Ga. 752; Knight v. State, 73 Ga. 804; Knox v. State, 89 Ga. 259. See also, in

this connection, Crocker v. State, 47 Ga. 568; Johnson v. State, 65 Ga. 94 (2); Craig v. State, 108 Ga. 776; McWilliams v. State, 110 Ga. 290.

"If the two prosecutions really involve the same transaction, the fact that the offense charged in the second indictment is by name a different offense from that which is set forth in the first does not prevent a judgment under the first from

being a bar to the second prosecution."

Od considerable analogy to the case sub judice is the holding in Swain v. State, 91 Ga. App. 561 (86 SE2d 642), and commencing near bottom of page 564:

"Where, on the other hand, separate offenses arising out of a single transaction are included

as separate counts of an indictment, and the evidence necessary to convict on one of the counts precludes a finding of guilt on the other, the verdict is repugnant . . . ."

I do not concede that the indictment here charged "separate offenses" - but that it in two places simply charged the same offense. But even so,

under the above holdings, even if the offenses had been separate, the result would have been the same and would authorize a reversal of this case.

In the case of Waters v. State, 112 Ga. App. 201 (144 SE2d 477), it is held that a plea of former jeopardy is good where the transactions are the same, even though the offense be different as a matter of law. In Lock v. State, 122 Ga. 730(2) (40 SE 932), it is held that a plea of autre fois acquit is sufficient if it alleges the offense in the

second indictment is the same "or could have been made the subject of investigation under the first indictment" and alleges an acquittal under the first indictment. Surely, it cannot be contended

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that all of the conduct of the two defendants in the case subjudice could not have been fully investigated under the trial of either Count One or Count Two. In Franklin v. State, 85 Ga. 570 (11 SE 876), defendant was acquitted of simple assault and thereafter indicted for assualt with intent to murder growing out of the same transaction. The Court held: "There can be no second jeopardy as to either grade of assault, and as the major includes the minor, the second indictment comprehends the same simple assault of which accused was acquitted in the first indictment." The majority opinion cites several opinions as authority for its position,

but they are simply

32.

inapplicable; not a one of them is a case where the same facts would support a conviction of two counts of an indictment. These cited cases are: Pippin v. State, 205 Ga. 316 (5) where similar (not identical) offenses are charged; Sutton v. State, 124 Ga. 815 (1) where fornication and adultery were charged, and different facts are required to prove whether fornication or adultery; Lascelles v. State, 90 Ga. 347 (4), forgery charged to have been committed in different ways; Stewart v. State, 58 Ga. 577, 580 (3), where one felony was charged to have been committed in different ways; Haskins v. State, 11 Ga. 92 (1) where offenses of different grades charged in same indictment; Webb v. State, 47 Ga. App. 505, where two felonies

32A.

charged in one indictment to have been committed at different times.

The verdict of not guilty on Count One creates a repugnancy as to the verdict of guilty on Count Two; and the conviction is illegal. I therefore dissent from headnotes 6 and 7 and the corresponding divisions of the opinion of the majority.

2. On March 13, 1970, a judge of superior court of Atlanta Judicial Circuit issued a warrant and order permitting surveillance of the Defendants including use of recording devices for recording telephone conversations, commonly known as "wire-tapping". The devices were placed in use immediately, the conversations sought to be over-

heard were "wire-tapped" immediately and Defendants were arrested on the same day of issuance of the order, to wit, on March 13, 1970. Under

the terms of the applicable Federal statute, to wit: Title 18, USCA, § 2518 (5), it is provided that:

> "Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable . . . . and must terminate upon attainment of the authorized objective or in any event in thirty days."

and under Title 18, USCA, § 2518 (8a) it is provided that:

> "Immediately upon expiration of the period of the order or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions."

If the State Court's order did not contain the required language, to the effect that the authoriza-

tion "must terminate upon attainment of the authorized objective" it was an illegal order. Regardless, the law will write into the order the mandatory language of the statute. This leaves it too clear for argument. The interception was made on March 13, 1971, and the authorization terminated on that day; the State was required to make the recordings available to the issuing judge immediately,

34.

and sealed under his directions. The State did not comply with the law; it held the recordings out for all of that period from March 13 until April 7th - a time lapse of 25 days, thus rendering same absolutely and completely illegal.

Defendants moved to suppress these tape recordings, and objected to their introduction into evidence, and by stipulation the grounds of motion and objections were made continuing, to apply

throughout the trial. Further, when the tape-recordings were offered in evidence, objection was made on the ground that the State had not laid

34A.

a proper foundation for introduction of same. The motion to suppress and the objections to the tape-recordings were admitted into evidence on behalf of the State.

There is a Federal statute and a Georgia statute on the subject of surveillance and wire-tapping, both of which are similar, and both of which were enacted in 1968, although the Federal statute was enacted in June, and the Georgia statute was enacted in April. When return of the tape-recordings were finally made to the Judge, he issued an order in receipt thereof, reciting that his order had been issued under both Federal and Georgia statutes.

35.

There can be no question that the Federal statute controls where it occupies the same field of legislation as does the Georgia statute. The Constitution of Georgia of 1945, Article 12, Section 1, Paragraph 1 (Code Ann. § 2-8001) provides that the supreme law of this State is the Constitution of the United States and all laws made in pursuance thereof. The Supreme Court of Georgia has held that where there is a conflict between a Georgia statute and a Federal statute, the Georgia statute must yield to the Federal statute. See Southern Ry. Co. v. Atlanta Sand Co., 135 Ga. 35, at 39, 40 (68 SE 807). There is a conflict here in that the Georgia statute allows the tape-recordings to be returned

to the judge who issues the order within 30 days, whereas the Federal statute requires the return

immediately. New Criminal Code 26-3004 (1) (Am. L. 1968, pp. 1249, 1328) and Title 18-2518 (8) (a), U.S.C.A.

Actually, it is not clear as to whether the majority opinion contends the state law should be applied or the Federal law. It seems to rely on Federal law in stating that only contempt can be invoked under Federal statute for making a surveillance in an unauthorized and illegal fashion, although this is clearly and positively a misstatement of the law. But again, it seems to rely on State law when suggesting that thirty days are allowed thereunder for return of the order of

surveillance, whereas Federal law requires the return to be made immediately when the interception is finished.

But these Defendants, and all defendants,

are entitled to have all criminal laws construed most favorably towards helping them and most strongly against the State. Waldroup v. State, 198 Ga. 144 (30 SE2d 896); Balkcom v. DeFore, 219 Ga. 641 (135 SE2d 425); Matthews v. Everett, 201 Ga. 730 (41 SE2d 148); Curtis v. State, 102 Ga. App. 790 (118 SE2d 264); Carsello v. State, 220 Ga. 90 (137 SE2d 305). And as the trial judge's order of receipt provided that the order was issued under both State and Federal law, if there is any provision in either or both laws that will

help Defendants, they are entitled to the benefit of same. The majority opinion seems to entertain the opposite view.

The majority opinion holds that the trial court committed no error in overruling the motion to suppress and in overruling the objections to the

evidence, and asserts that the only remedy available to Defendants was to invoke the powers of the judge to hold the State of Georgia in contempt of court, citing the Federal statute. It is true that Title 18 USC 2518 (8) (c) provides that for violation of this statute such violator "may" be punished for contempt of the issuing or denying judge. But contempt of court is not the only remedy. Title 18, U.S.G.A., § 2515 provides that

no such communication shall be received in evidence "if the disclosure of that information would be in violation of this chapter" which means that all of the provisions of the chapter respecting the manner of obtaining the communication must be complied with before it is admissible. Again, Title 18, U.S.C.A. 2518 (10a) allows the aggrieved party to move to suppress the contents of any

intercepted communication on various grounds, including the ground that the interception was not made in conformity with the order of authorization or approval. We repeat that the law writes into the order (if the judge omits to place same therein) that the authorization ceases immediately upon making the interception, and the record must be made available to the issuing judge immediately.

39.

Defendants' motion to suppress was couched in language concluding with:

> "The interceptions were not made in conformity with the order of authorization or approval."

As to whether Defendants were limited to invoking the contempt powers of the court, that question has been plainly and clearly decided by the Supreme Court of Georgia in Cross v. State,

225 Ga. 760 (171 SE2d 507). The State's brief makes this rather amazing statement in reference to same:

> "To us it is obvious that if we are to go to the federal law, as in Cross v. State, 225 Ga. 760, the appellant

> cannot prevail, because the matter is for the judge who issued the warrant to enforce under his contempt powers and not a ground for suppression."

The majority opinion seems to approve this argument in State's brief. But the Cross case holds directly opposite the statement set forth in State's brief, and exactly opposite the majority opinion, at page 764, as follows:

> "We think that, without resort to the reasoning applied in the case of Weiss v. United

States, 308 U.S. 321, supra, it is apparent that the language of § 2515, above, is expressly prohibitive

41.

of the introduction into evidence of any intercepted communication, be it interstate or intrastate, acquired in violation of the provision of Chapter 119 of 18 U.S.C.A. We, therefore, need look only so far as is necessary to determining whether the provisions of that Act have been complied with, for if they have not, then the reception in evidence of the intercepted message in these cases constitutes reversible error, and it is unnecessary to a decision of these cases to determine whether the Georgia statute under which

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the district attorney purported to act is or is not constitutional, because if Chapter 119 was not complied with a reversal of the conviction is required irrespective of that question." (Emphasis added)

In the Cross case the judgment was reversed.

Further, the objections made by Defendants to these tape recordings at the time of their introduction should have been sustained, which objection was that no proper foundation or basis had been laid for such introduction. In Solomon v. Edgar, 92 Ga. App. 207 (3) (88 SE2d 167), it is held at page 211 that "a proper foundation for their (mechanical transcriptions) use must be made as follows:

(1) It must be shown that the mechanical transcription device was capable of taking testimony.

(2) It must be shown that the operator of the device

was competent to operate it. (3) The authenticity and correctness of the recordings must be established. (4) It must be shown that changes, additions, or deletions have not been made. (5) The manner of preservation of the record must be shown. (6) Speakers must be identified. (7) It must be shown that the testimony elicited was freely and voluntarily made, without any kind of duress." But in the case subjudice there was no evidence as to the competency of the operator of the mechanical device.

it was not clearly shown that "changes, additions, or deletions have not been made." To the contrary, one of the State's important witnesses in this respect was Mrs. Juanita Kersey, a respected employee or official in the office of the District Attorney, and who was entrusted with transcribing

the tapes to writing. This witness testified that while the tapes were in her custody she transcribed the message into writing, and then returned the tapes to Mr. Boyle; then she had occasion to listen to the tapes again, in the presence of other representatives of the District Attorney, and as to this transaction, she testified:

> "I listened to them with the gentlemen identified as Mr. Jim Bowen and Mr.

> Robert Ridley. We listened, there were things that I heard again that I had not heard before. There were a few occasions where Mr. Ridley or Mr. Crist said this is what we said. If I did not hear it, if I could not hear it, I told the gentlemen I was sorry that I could not hear what they could hear and I could not put it in my transcript."

Thus, instead of the State's carrying the burden of proving a proper foundation, as required by the Solomon case, supra, that "no changes, deletions or additions" had been made the absolute contrary was proven and that this State's witness, who had control of the tape recording heard things the

second time the tape was played that she had not heard before. And, leaving it beyond peradventure as to the tapes having been altered consider the testimony of Dr. Willis Elvis Moody, of Georgia School of Technology, who testified as an expert for the defendants that the tapes had been altered. It will be borne in mind, however, that defendants had no burden of proving the tapes had been altered; the burden was on the State to prove they had not been altered.

Before any person is convicted of crime in

this State, he is entitled to a fair and legal trial. In the language of the learned and eminent jurist, Logan E. Bleckley, almost a hundred years ago (1878) in the case of Cochran v. State, 62

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Ga. 732 - 733:

> "The State, were it to disregard forms, would not be a government, but a mob. It's action would not be administration, but violence. The public authority has a formal embodiment in the state, and when it moves, it moves as it has said by its laws it will move. It proceeds orderly and according to pre-established regulations. The state, though sovereign, cannot act upon the citizen in a different manner from that which the laws have ordained . . . Courts are bound by the law no less than the prisoner at the

bar . . . Why try him at all, if he is not to be tried as the law prescribes?"

48.

Therefore, as an additional reason for reversal, the tape recordings were illegally admitted; and I dissent from the holdings of the majority opinion in headnotes 2 and 3 and the corresponding divisions of the opinion.

While I have been unable to convince my distinguished Associates on this Court and this lengthy dissent may seem fool-hardy, I would remind those who may have taken the trouble to read this far, if any, that Chief Justice Charles Evans Hughes, in his excellent work entitled "The Supreme Court of the United States," at p. 68 says:

"A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future

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day, when a later decision may possibly correct the error into which the dissenting judge believes the court has been betrayed."

For all of the foregoing reasons, I would reverse this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1121

RICHARD A. PETREE, SR.

VS.

THE STATE OF GEORGIA

BRIEF IN RESPONSE TO PETITION FOR THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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JURISDICTION

Jurisdiction is not conceded. The respondent contends that the judgment of the Georgia Court of Appeals of which review is here and now sought rests on independent and adequate state substantive grounds (*Murdock v. City of Memphis,* 20 Wall. 590, 22 L.Ed. 429 (1874); *Wolfe v. State of North Carolina,* 364 U.S. 177, 80 S.Ct. 1482, 4 L.Ed. 2d 1650; rel. den. 364 U.S. 856, 81 S.Ct. 29, 5 L.Ed. 2d 80 (1960)).

While perhaps not strictly jurisdictional it would seem

that, as was the situation in *DeBacker v. Brainard,* 396 U.S. 28, 90 S.Ct. 163, 24 L.Ed. 2d 148 (1969), this case does not present a factual situation sufficient as a basis for the ruling the Court is invited to make. In other words, the Petitioner's problems are not of true constitutional dimensions.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Petition contains all such that are deemed applicable.

QUESTIONS PRESENTED

I.

WHETHER ANY SUBSTANTIAL FEDERAL QUESTION WAS PRESENTED TO OR DECIDED BY THE STATE COURT.

II.

WHETHER THE RULE OF *DUNN V. UNITED STATES*, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356, (1932), THAT CONSISTENCY BETWEEN VERDICTS OF ACQUITTAL AND OF CONVICTION ON COMPANION COUNTS OF AN INDICTMENT RETURNED BY A SINGLE JURY IS NOT NECESSARY, HAS BEEN ERODED COMPLETELY OR IN PART BY THE RULINGS IN *ASHE V. SWENSON*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d. 469 (1970) THAT COLLATERAL ESTOPPEL IS PART OF THE DOUBLE JEOPARDY GUARANTEE, AND ITS APPLICATION A MATTER OF "CONSTITUTIONAL FACT".

STATEMENT OF THE CASE

Petree, an Atlanta Alderman, and Ansley, an attorney of the Atlanta bar, were jointly indicted and tried upon a two-count indictment charging violations of two different provisions in the Criminal Code of Georgia penalizing misconduct by public officials and their confederates.

The trial judge refused to require an election between the counts by the prosecution, but in his instructions required the jury in the event of a finding of guilt on either count to acquit on the other. Both were acquitted on the first count, both convicted on the second.

Petree has been unsuccessful in getting his conviction overturned by the Georgia Court of Appeals or Supreme Court and now petitions this Court for the Writ of Certiorari to the Georgia Court of Appeals.

ARGUMENT

I.

WAS ANY SUBSTANTIAL FEDERAL QUESTION PRESENTED TO OR DECIDED BY THE STATE COURT?

As to repugnancy and inconsistency of the verdict the State Court held:

> "7. Finally, we reach the contention that the verdicts of not guilty of Count One and guilty of Count Two are repugnant and inconsistent. Obviously the indictment purports to allege aspects of the same conduct to state two offenses based on the same transaction, the first under Code Sec. 26-2301(2) and the second under Code Section 26-2304(b).

The meaning of the offense set forth in Code Sec. 26-2301(2) is dependent upon the language of Code Sec. 26-2301(1) with respect to the purpose for which the person 'solicits or receives' and is thus restricted to 'influencing *him* in the performance of any act related to the functions of *his* office or employment' (emphasis added) whereas the purpose under Sec. 26-2304(b) is 'an agreement to procure or attempt to procure the passage or defeat the passage of any legislation' which includes solicitation for the sale of influence by the perpetrating officer or employee, who might or might not be a member of the legislative body, on others, members of the legislative body, to assure the passage or defeat of legislation. Thus to the extent that it is alleged under Count One that Petree, with Ansley as his abettor, solicited the sale of his own vote as a member of the legislative body, the alleged transaction is an offense under Code Sec. 26-2301(2), but should it appear that the solicitation was for an agreement, expressed or implied, to procure or attempt to procure the passage or defeat of legislation, it involves the attempted sale of his influence on other members of the legislative body, and comes under Code Sec. 26-2304(b). In brief, we see a distinction in accusing Petree, in conjunction with Ansley, of soliciting the sale of his own vote, and in accusing him in conjunction with another, of soliciting the sale of his influence in procuring favorable legislative action, which might or might not include his own vote. Thus, from the standpoint of conviction and acquittal, an acquittal under Count One of the indictment as alleged is not, as a matter of law, inconsistent and repugnant to a simultaneous conviction of Count Two. Accordingly, the rule in *Kuck v. State*, 149 Ga. 191 (99 SE 622), and similar cases is inapplicable to the present case. See *Blair v. State*, 81 Ga. 629 (7 SE 855).

> We recognize further that the trial judge, having refused to require the State to elect upon which count it would proceed, acted favorably to the defendants in requiring the jury in the event of a finding of guilt on one count, to acquit on the other. Even if two separate offenses were alleged, for reasons already stated, the action of the trial judge is consonant with the guidelines stated in Code Sec. 26-506(a) which protect an accused from a conviction 'of more than one crime if (1) one crime is included in the other, or (2) the crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct."

This construction of the Georgia Criminal Code is binding upon this Court. *Coleman v. Alabama,* 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed. 2d 387 (1970).

The State Court has simply held that by two separate provisions the Georgia General Assembly has made penal the selling by a municipal legislator of his own vote on a particular measure and the selling by the same legislator of his influence on his fellow members, which as a practical matter amounts to selling his vote on past and future measures in which his fellow members have been and will be interested.

In view of the magnitude of the evil inherent in venality on the part of public officials no reason appears why one could not be convicted and punished under either or both provisions for the same transaction. In a small legislative body there is no reason whatever why a member can not procure the passage of a measure without himself voting for it, or even when he himself votes *against* it. His fellow-members would readily understand that he could feel compelled to vote and vote *against*

that which he was personally *for* because of the strong feelings *against* of a majority of his constituents.

The verdict was not necessarily inconsistent, either logically or legally. In *United States v. Abrams,* 427 F.2d 86 (2nd Cir. 1970) it was held that an acquittal on a related count could not undermine the correctness of a conviction on another count where there was no more than possible inconsistency in the jury verdict. *Dunn* was cited as authority. Certiorari was denied, 400 U.S. 832, 91 S.Ct. 64, 27 L.Ed.

The Criminal Code of Georgia was revised and re-enacted by Georgia Laws 1968, pp. 1249 et seq., effective July 1, 1969. The committee notes to Chapter 26-23, which contains both sections referred to by the Georgia Court of Appeals, state that Section 26-2301 replaces a dozen sections of the former Criminal Code defining bribery, essentially originating in the common law. As to Section 26-2304, paragraph (a) had its origin in a 27-Section "Honesty in Government" statute enacted in 1958, applicable primarily at the state level, while paragraph (b) had its origin in the local government counterpart of the "Honesty in Government" law, enacted in 1964. Committee Notes, Chapter 26-23, Abuse of Governmental Office, Criminal Code of Georgia, 1971 Revision (Pamphlet) pp. 147, 148.

The Georgia Court of Appeals had held in *Taylor v. State,* 42 Ga. App. 443 (156 S.E. 623) (1931), and *Taylor v. State,* 44 Ga. App. 387 (161 S.E. 793) (1931), that the procuring of the passage and adoption of an ordinance of the Atlanta City Council by the Clerk of that body for pay was not an offense under the then existing bribery laws (principal progenitors of present

Section 26-2301 and couched in similar language). There was a special concurrence in the first decision, a dissent to the latter.

The rationale of the Court in the two cases involving *Taylor* and in Petree's case is the same.

It thus appears that there can be no pretense that the state court adapted its view in order to evade a constitutional issue. The case having been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong. (*Wolfe v. State of North Carolina,* supra).

In addition, the Georgia Court approved the action of the trial judge in requiring an acquittal upon either count of the indictment in the event of a conviction upon the other. This appears to be all that *Ashe v. Swenson,* supra, could require, and to eliminate any vestige of a federal question.

In *DeBacker v. Brainard,* 396 U.S. 28, 90 S.Ct. 163, 24 L.Ed. 2d 148 (1969), this Court declined to consider whether the preponderance of evidence standard in a Nebraska statute relating to Juvenile Court proceedings satisfied Fourteenth Amendment due process requirements, finding consideration not appropriate in the circumstances of the case. The circumstances pointed out were that the juvenile's counsel at the juvenile court hearing finding the juvenile to be a delinquent child did not object to application of the preponderance of evidence standard, and admitted in oral argument before this Court that the evidence would have been sufficient to support a finding of delinquency even under a reasonable doubt standard.

Petree was tried one time, convicted of one offense,

and has received one sentence. Thus far there has been no question as to the sufficiency of the evidence. It would seem most inappropriate from these facts as a base to go into consideration of complicated questions of collateral estoppel and double jeopardy.

The first question should be answered in the negative.

II.

IS *DUNN V. UNITED STATES* GOOD LAW SINCE *ASHE V. SWENSON* WAS DECIDED?

Although not expressed, Petitioner obviously contends that when *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969) made the fifth amendment double jeopardy provision applicable to the states through the Fourteenth Amendment it made applicable also the federal court decisions on former jeopardy, and that these decisions support his position. With this last we take issue.

This Court, speaking through Mr. Justice Holmes, in *Dunn v. United States* (284 U.S. 390, at p. 393) held that consistency in a verdict is not necessary and quoted with approval from Judge Learned Hand's opinion in *Steckler v. United States*, 7 F.2d 59, 60 (2nd Cir. 1925):

> '"The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'"

There was a vigorous dissent by Mr. Justice Butler (commencing at p. 394).

What should be required is consistency within individual counts and an ample evidentiary base for conviction. (*Gillars v. United States*, 182 F.2d 962, 966 (D.C. 1950)).

Dunn has been followed and is being followed in all of the circuits. See the three pages of citations in the annotation in 18 ALR 3d 259, Sec. 3, commencing at p. 274, and in the same section in the current pocket supplement, also *United States v. Smallwood*, 443 F.2d 535, 543 (8th Cir. 1971); *United States v. Panzavecclina*, 446 F.2d 1293, 1296 (5th Cir. 1971); *United States v. Fox*, 433 F.2d 1235 (D.C. 1970). In *Fox*, Chief Judge Bazelon in a special concurrence (433 F.2d at p. 1239) suggests that there is a question whether *Dunn* has survived *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469.

In so far as *Dunn* rests on the proposition stated in the opinion that each count is regarded as a separate indictment, and if the indictments had been separately prosecuted on the same evidence, an acquittal on one count would not have been res judicata on the others, the "same transaction" test in *Ashe*, along with the doctrine of collateral estoppel, probably would leave *Dunn* emasculated. But *Dunn* does not depend entirely, or even principally upon application of the "same evidence" rule.

Of equal or greater importance in *Dunn* is the quotation from *Steckler v. United States*, recognizing that a jury is not a computer or a calculator or even an adding machine. Juries are composed of men, and as such capable of being influenced by emotion as well as by reason. It recognizes also something that seems to be overlooked because an acquittal by a jury is not appealable, that in

cases such as we are now discussing it could be argued with equal force and logic that the verdict of acquittal is void for inconsistency because the guilty verdict establishes the existence of all necessary facts and that the jury believed them proved beyond a reasonable doubt. This may be another instance of the difficulty of applying the doctrine of collateral estoppel in criminal prosecutions, alluded to by the Chief Justice in his dissent in *Ashe*.

It would appear that the practicalities favor taking jury verdicts on multiple count indictments at face value without attempting to harmonize or reconcile the findings. As far as the defendant is concerned, the acquittals are then acquittals and the errorless convictions are then convictions, and the incidents of each those provided by law.

The ALR annotation to which we have already referred was prepared in 1968. In 136 pages it treats the subject of inconsistency in criminal verdicts exhaustively. It appears that a decision by some Appellate Court can be found in support of any conceivable position. However, the rule in *Dunn* appears unquestionably to be the majority rule. In California the rule appears to be statutory. *People v. Amick*, 20 Cal. 2d 247, 125 p. 2d 25 (1942).

Under the foregoing authorities, the second question should be answered in the negative.

CONCLUSION

The writ should not be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carter Goode, hereby certify that I have this day deposited three copies of the within and foregoing brief in response to petition for the writ of certiorari in a United States mail box, with first class postage prepaid, addressed to Thomas H. Antonion, Esq., counsel of record for Richard H. Petree, Sr., petitioner, at his address of record, 1421 Candler Building, 127 Peachtree Street, N.E., Atlanta, Georgia 30303.

This.....day of May, 1972.

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